IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 1125 of 2007
In
SPECIAL CIVIL APPLICATION No. 11206 of 2005

WITH

LETTERS PATENT APPEAL No. 1123 of 2007
In
SPECIAL CIVIL APPLICATION No. 17839 of 2006

AND

LETTERS PATENT APPEAL No. 1124 of 2007
In
SPECIAL CIVIL APPLICATION No. 17852 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT & 2 - Appellant(s)
Versus

NK MEKWAN MANAGING TRUSTEE AND MANAGER & 1 - Respondent(s)

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Appearance :

MS VARSHA BRAHMBHATT, AGP for Appellant

MR BIPIN JASANI for Respondent No.1

Rule served to Respondent No.2 by DS.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 18/07/2007

ORAL JUDGMENT

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. These Appeals under Clause 15 of the Letters Patent arise out of common judgement and order dated 31st March, 2007 passed by the learned Single Judge in the above numbered Special Civil Applications, whereby at the request of learned advocate for the petitioner, all the three petitions have been disposed of as the interim orders passed by the Court had been complied with by the respondents.

2. Vide order dated 3.7.2007, these appeals had been admitted and on the Civil Application for stay, notice had been made returnable on 17.7.2007. Considering the fact that the issue involved in the present appeal lies in a very narrow compass, instead of deciding the matters on the question

of interim relief, we have heard the appeal on merits and the same are decided by this common order.

3. The respondent No.1 – original petitioner in all the appeals, is the Managing Trustee of Jivan Prakash Education Trust and Manager of Ashish Vidyalaya (hereinafter referred to as "the said School"), which is registered as a religious minority institution. The said School is a non-government minority secondary school recognized under the provisions of the Gujarat Secondary Education Act and is also covered under the Direct Payment of Salary Scheme as a Grant In-Aid Educational Institution.

4. For the sake of clarity, the facts of each of the Special Civil Applications are set out separately.

SPECIAL CIVIL APPLICATION NO.11206 OF 2005 :

5. It appears that there was a requirement for filling up the post of Shikshan Sahayak in the subject of Gujarati in the said School. Therefore, the said School submitted a proposal dated 4th December, 2004 to the District Education Officer, Ahmedabad City, for grant of "No Objection Certificate" (N.O.C.) in the subject of Gujarati. In reply to the said proposal, the District Education Officer, by a letter dated 13th

December, 2004, informed the respondent No.1 – original petitioner that the N.O.C. as requested for cannot be granted as the Commissioner of School has imposed a ban on the grant of N.O.C.

6. It was the case of the respondent No.1 that it being a Minority Educational Institution, it is not required to obtain an N.O.C. for recruitment of Shikshan Sahayak and therefore, the said School issued an advertisement in a daily newspaper dated 13th January, 2005, inviting applications from the candidates having qualification of B.A., B.Ed. for the post of Shikshan Sayahak in the subject of Gujarati, in the fixed pay of Rs.4,000/-. Pursuant to the selection process, the Selection Committee selected the respondent No.2 herein (original respondent No.4), and appointed him on the post of Shikshan Sahayak in the fixed pay of Rs.4,000/-, pursuant to which the respondent No.2 resumed duty on 10th February, 2005 and is working as such with effect from the said date.

7. Thereafter, respondent No.1 submitted a proposal to the District Education Officer on 17th February, 2005 for allotment of employee code number for releasing the salary of respondent No.2 under the Direct Payment of Salary Scheme. Vide order dated 21st February, 2005, the District Education Officer rejected the said proposal on the ground that, as the provisions of the Government Resolution dated 6th October, 1998 had

not been followed, the selection of the respondent No.4 cannot be approved and therefore, the employee code number cannot be allotted.

8. Being aggrieved, the respondent No.1 approached this Court by way of the above referred Special Civil Application No.11206 of 2005, challenging the aforesaid order dated 21st February, 2005 and seeking a further declaration that the Government Resolution dated 6th October, 1998 is not applicable to a Minority Educational Institution, and that the respondent No.2 is entitled to get regular salary under the Direct Payment of Salary Scheme from the District Education Officer.

9. By an order dated 20th September, 2005, the aforesaid Special Civil Application was admitted and interim relief was granted in the following terms :

> *"Pending this petition, the District Education Officer is directed to grant ad hoc approval to the appointment of the respondent no.4 as a Teacher in the petitioner-School for the purpose of salary grant. Such approval shall be subject to the result of this petition."*

SPECIAL CIVIL APPLICATION NO.17852 OF 2006 :

10. It appears that, there was a vacancy of Head Master in the respondent No.1 School, therefore,

the respondent No.1 an made application dated 14th June, 2005 to the District Education Officer for grant of N.O.C. for recruitment to the post of Head Master. It appears that there was no response to the said application, therefore, the respondent No.1 School issued advertisement in a daily newspaper on 17th August, 2005 and invited applications for the post of Head Master. Pursuant thereto, the respondent No.2 was selected as the Head Master, and by an order dated 16th November, 2005, he was appointed to the post of Head Master in the pay scale of Rs.6,500/- – Rs.10,500/- with effect from 16th November, 2005. Thereafter, the respondent No.1 submitted a proposal dated 25th November, 2005 to the District Education Officer for approval of selection of respondent No.2 and allotment of employee code number for releasing the salary of the respondent No.2 under the Direct Payment of Salary Scheme. By an order dated 21st January, 2006, the District Education Officer rejected the said proposal on the ground that the respondent No.1 School had not complied with the instructions issued by the office of the D.E.O. in respect of its request for N.O.C. Being aggrieved, the respondent No.1 approached this Court by way of the above numbered Special Civil Application No.17852 of 2006.

SPECIAL CIVIL APPLICATION NO.17839 OF 2006 :

11.Similarly, it appears that there was a vacancy

for the post of Shikshan Sahayak in the respondent No.1 School and since, in the opinion of the respondent No.1 School, it was not required to obtain an N.O.C. for recruitment of Shikshan Sahayak, the respondent No.1 School issued advertisement in a daily newspaper on 18th April, 2006 and invited applications for the post of Shikshan Sahayak in the fixed pay of Rs.4,000/- from the candidates having qualification of B.A., B.Ed. Thereafter, the respondent No.2 was selected by the Selection Committee, and by an order dated 24th July, 2006, he was appointed to the post of Shikshan Sahayak and he resumed duty on 27th July, 2006.

12. Thereafter, the respondent No.1 submitted a proposal dated 22nd June, 2006 to the District Education Officer, seeking approval of selection of respondent No.2, and allotment of employee code number for releasing the salary of the respondent No.2 under the Direct Payment of Salary Scheme. By an order dated 1st July, 2006 passed by the District Education Officer, the aforesaid proposal was rejected stating that prior approval for appointment of the candidate selected by the selection committee is not granted as prior permission for recruitment to the vacant post of Shikshan Sahayak had not been obtained. Being aggrieved, the respondent No.1 approached this Court by way of the above numbered Special Civil Application No.17839 of 2006.

13.Both the aforesaid Special Civil Applications No.17839 of 2006 and No.17852 of 2006 came up for hearing on 15th September, 2006, whereupon the learned advocate for the respondent No.1 placed reliance upon the interim order dated 20th September, 2005 made in Special Civil Application No.11206 of 2005. By an order of even date, the Court admitted the Special Civil Applications and granted interim relief in favour of respondent No.1 in the following terms:

> *"7. It is directed to District Education Officer, Ahmedabad City, Ahmedabad to grant ad-hoc approval to the concerned appointment of respondent No.4 as a teacher/head master in the petitioner's school for the purpose of salary grant. Such approval shall be subject to the result of this petition."*

14.It may be pertinent to re-produce paragraph No.3 of the said order dated 15th September, 2006, which reads as under :

> *"3. In view of the aforesaid order, without examining the merits of the matter when respondent No.4 in both the petitions are working with the petitioner and only question of prior approval of the District Education Officer is not obtained is to be examined by this Court."*

15.It appears that the aforesaid interim orders were complied with by the District Education Officer by passing the orders dated 24th October, 2005, 4th November, 2006 and 4th November, 2006 respectively

in the terms of interim direction given by the Court.

16. It appears that the aforesaid Special Civil Applications were listed for hearing on 31st January, 2004, whereupon the learned advocate for the respondent No.1 submitted that the orders passed by the Court have been complied with by the respondents, therefore, the petitions may be disposed of accordingly. The learned advocate placed on record the aforesaid three orders dated 24th October, 2005, 4th November, 2006 and 4th November, 2006. The learned Single Judge, recording the aforesaid submissions of the learned advocate for the respondent No.1, was pleased to dispose of all the three petitions by common judgement and order dated 31st January, 2007, which reads as under :

> *"[1] Heard learned advocate Mr.Jasani appearing on behalf of the petitioners and learned A.G.P. Mr.Dabhi appearing on behalf of the respondent – State.*
>
> *[2] Learned advocate Mr.Jasani submitted that the order passed by this Court has been complied by the respondents, therefore, present petitions may be disposed of accordingly.*
>
> *[3] Learned advocate Mr.Jasani has placed on record the three orders dated 24th October 2005, 4th November 2006 and 4th November 2006.*
>
> *[4] In view of these three orders, all the petitions are disposed of accordingly."*

17. Being aggrieved by the aforesaid common judgement and order dated 31st January, 2007 passed by the learned Single Judge in the above numbered Special Civil Applications, the State is in appeal.

18. Heard, Ms.Varsha Brahmbhatt, learned Assistant Government Pleader for the appellants and Mr. Bipin Jasani, learned Advocate for the respondent No.1 in each of the appeals. Though the respondents No.2 in each of the appeals have been served, no appearance has been filed on their behalf.

19. In the background of the facts stated hereinabove, it is apparent that while admitting the Special Civil Applications, orders granting interim relief had been passed by the learned Single Judge. In compliance with the said orders the District Education Officer passed orders granting ad-hoc approval to the appointment of the respondent No.2 as a teacher of the respondent No.1 school for the purpose of salary grant. In the very interim orders pursuant to which the aforesaid orders were passed, it has been clarified that such approval shall be subject to the final result of the petition. In the circumstances, or even otherwise, the grant of any interim relief would only be by way of an interim arrangement, during the pendency of the petitions, which would have to abide by the final orders passed in the petitions. In the

present case admittedly there is no adjudication on merits. The District Education Officer, passed the aforesaid orders only in due compliance with the interim orders made in the Special Civil Applications, which is reflected in the said orders. Of course, by virtue of the aforesaid orders passed by the District Education Officer, the grievance of the respondent No.1 stood more or less redressed in view of the fact that the nature of the interim relief granted by the Court amounted to more or less granting the final relief prayed for in the petitions. But nevertheless, the said orders were only an interim orders, and the life of such orders would enure only till the final orders are passed in the matters. If the petitions were to be finally allowed then the interim orders would also become final but in the event the petitions failed, the interim orders would stand vacated and the life of the orders passed in compliance with the interim orders would also come to an end. In the circumstances, merely because ad-hoc approval had been granted pursuant to the interim orders, the petitions could not have been disposed of in terms of the interim orders without adjudicating the matters on merits.

20. The learned Advocate for the respondent No.1 has submitted that in view of the orders passed by the DEO pursuant to the interim orders, its grievance stood redressed, hence, no fruitful

purpose would have been served had the petition been kept alive.

21. The preposterous argument advanced by the learned Advocate for the respondent cannot be countenanced even for a moment. If the said argument were to be accepted all matters would stand disposed of on the basis of interim orders without any final adjudication on merits.

22. In the case of ***South Eastern Coalfields Ltd. v. State of M.P.*** (2003) 8 SCC 648 the Supreme Court while dealing with interim orders granted in favour of any party to a litigation for the purpose of extending protection to it, effective during the pendency of the proceedings, has held thus:

> *"26. XXXXXXXX. The interim order passed by the Court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of final decision going against the party successful at the interim stage. Unless otherwise ordered by the Court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the Court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution would far from meeting the*

ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the Court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the Court at the stage of final decision, the Court earlier would not or ought not to have passed. There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed."

"28. That no one shall suffer by an act of the Court is not a rule confined to an erroneous act of the court; the 'act of the court' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the Court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the Court not intervened by its interim order when at the end of the proceedings the Court pronounces its judicial verdict which does not match with and countenance its own

interim verdict. Whenever called upon to adjudicate, the Court would act in conjunction with what is the real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the Court withholding the release of money had remained in operation." (emphasis supplied)

23. In the case of ***Vithal v. State of Karnataka***, (2004) 10 SCC 162 the Supreme Court was dealing with a case wherein during the pendency of the appeal, the appointments were made in compliance with the interim order of the appellate court. All appointees gave undertakings as specified in

the interim order and were perfectly aware that their appointments were subject to the decision in the pending appeal. The appeal was ultimately dismissed by the Division Bench of the High Court on 29-11-1999. However, while affirming the decision of the learned Single Judge, the Division Bench directed that those persons who had been appointed during the pendency of the appeal till the date of the Division Bench's decision, on the basis of their rural weightage, would continue in service. Some of the candidates who had been superseded by the appointees with rural weightage, approached the Supreme Court challenging the confirmation of the order passed by the Division Bench insofar as it allowed the appointees with rural weightage whose appointments were subject to the outcome of the appeal, to continue in service. The Supreme Court disposed of the appeals on 11.10.2001 holding that the directions of the Division Bench of the High Court allowing the appointees with rural weightage to continue in service despite their having been appointed only pursuant to the interim order passed by the Division Bench were unsustainable in law.

24. Thus, it goes without saying that the life of the interim order is only till the disposal of the petition or till it is otherwise vacated. Once the petition is disposed of the interim order comes to an end. In fact, in view of the principles enunciated by the Supreme Court in

the aforesaid decisions, in case the decision goes against the party who had secured the interim relief, such party would be liable to return the benefits obtained by virtue of the interim order.

25. On the facts of the present case, if the respondent No.1 (original petitioner) did not desire to pursue the petition, the same could have been disposed of as withdrawn and the interim relief granted earlier would stand vacated. But without adjudicating the case of merits the same could not have been disposed of in view of the compliance of the interim orders passed by the Court, as has been done in the present case.

26. In the circumstances, we are left with two options, either to set aside the impugned judgement and order and restore the original petitions to file or to clarify that in view of the disposal of the Special Civil Applications the interim relief granted earlier stands vacated.

27. However, it appears that it was never the intention of the respondent No.1 to give up the cause, hence, in the interest of justice we deem it fit to resort to the first option.

28. For the foregoing reasons the appeals succeed and are hereby allowed. The impugned common

judgement and order dated 31.01.2007 passed by the learned Single Judge is hereby quashed and set aside and Special Civil Applications No.17839 of 2006, 11206 of 2006 and 17852 of 2006 are restored to file for deciding the same on merits. There shall be no order as to costs.

[A.M.KAPADIA, J.]

[HARSHA DEVANI, J.]

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